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Supreme Court of the United States

OCTOBER TERM, 1947.

No. 610

POLAND COAL COMPANY, a corporation, *Petitioner*,

v.

HILLMAN COAL & COKE COMPANY, a corporation, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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CITATIONS.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

To the Honorable Fred M. Vinson,
Chief Justice of the United States,
and the Associate Justices of the
Supreme Court of the United States:
Your petitioner respectfully shows:

A.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

This is a petition for a Writ of Certiorari to review the decree of the Supreme Court of Pennsylvania, entered November 10, 1947, (R. 326) Reargument refused November

24, 1947 (R. 326), affirming the order of the Court of Common Pleas of Greene County, discharging a rule to show cause why the award of an arbitrator should not be vacated (R. 328), granted pursuant to the Pennsylvania Arbitration Act of 1927, P. L. 381, No. 248; 5 P. S. 161.

NOTE: There were two suits in the lower court, between the same parties—one in Equity involving the validity of an option and one at law involving the legality of an arbitration. This petition is based on the action at law.

B.

JURISDICTION.

The jurisdiction of this Court is involved under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, on the ground that the decision below was a final judgment or decree rendered or passed by the Supreme Court of Pennsylvania, the highest court of the state in which a decision could be had, where is drawn in question the validity of a statute of the State of Pennsylvania (Arbitration Act of 1927, P. L. 381, No. 248; 5 P. S. 161) on the ground of its being repugnant to the Constitution of the United States and which decision denied a title, right or privilege, or immunity specially set up or claimed by petitioner under the Constitution of the United States (14th Amendment).

The authorities relied upon to sustain such jurisdiction are:

Strauss v. *Am. Publisher's Ass'n,* 231 U. S. 222;
Great Northern R. Co. v. *Washington,* 300 U. S. 154, 165;
Omaha v. *Omaha Water Co.,* 218 U. S. 180;
Gt. Northern Ry. v. *Washington,* 300 U. S. 154;
Beidler v. *S. Carolina Tax Comm.,* 282 U. S. 1;
Norris v. *Alabama,* 294 U. S. 587;

And other reasons cited in Part B of the supporting brief (pp. 9-10).

C.

QUESTIONS PRESENTED.

1. Whether the judgment of the Supreme Court of Pennsylvania deprived petitioner of its property without due process of law in violation of Section 1 of the Fourteenth Article of Amendment to the Constitution of the United States, where was drawn in question the validity of statute of the State of Pennsylvania (Arbitration Act of 1927, P. L. 381, No. 248; 5 P. S. 161) on the ground of its being repugnant to the Constitution of the United States and which decision denied a title, right or privilege, or immunity specially set up and claimed by petitioner under the Constitution of the United States.

2. Whether a decision of the Supreme Court of Pennsylvania is not in accord with applicable decisions of this Court, where the parties to a mining lease fail to agree on the remaining tonnage of recoverable coal and the present worth of the royalties payable thereon and one party requests an investigation and determination thereof by the arbitrator designated in the lease to make such a determination in the event the parties cannot agree.

3. Whether such decision of the Supreme Court of Pennsylvania denied a federal right in express terms and in substance and effect, where the court found without substantial support in the evidence, that there was no controversy, within the meaning of the word as used in the Arbitration Act of Pennsylvania, to be settled by an arbitrator, and found the arbitrator was to calculate the remaining mineable coal tonnage by applying the rules of measurement customary to the profession, without disclosing the basis of the calculation.

4. Whether such decision of the Supreme Court of Pennsylvania is not in accord with the applicable decisions of this court, where such arbitrator failed to hold a hearing or give notice thereof, did not take testimony under oath or otherwise, and based his award solely on an *ex parte* in-

vestigation, in which he had the accuracy of the maps checked, had the thickness of the coal measured, had the areas of coal remaining measured, and had the probable recoverable coal calculated.

5. Whether a common law award involves a hearing and notice thereof, the right to produce evidence and cross-examine that produced.

D.

MATERIAL FACTS AND PROCEEDINGS BEFORE THE COURTS OF PENNSYLVANIA.

1. *The Parties.* The petitioner, Poland Coal Company (petitioner and appellant below) is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. The respondent, Hillman Coal & Coke Company (appellee below) is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania.

2. *Nature of the Action.* The petition was filed June 15, 1946, in the Court of Common Pleas of Greene County, Pennsylvania, pursuant to the provisions of Section 10 of the Pennsylvania Arbitration Act of 1927, P. L. 381, No. 248; (5 P. S. 161, 170) alleging misconduct by an arbitrator in making an award, and praying the court to vacate the award (87a).

On June 15, 1946, the court granted a rule on the respondent to show cause why the award should not be vacated (91a). The respondent filed an answer (93a) and after hearing, the court discharged the rule (129a).

From this order an appeal was taken to the Supreme Court of Pennsylvania (R. 327) which court on November 10, 1947, entered a decree affirming the order and refused a petition for reargument, on November 24, 1947 (R. 326).

3. *The Petition* alleged the execution of a lease agreement of coal property between the parties, which contained

an option to the Lessee to purchase the remaining tonnage of recoverable coal, to be determined jointly by the Lessor and Lessee, and provided if the parties failed to agree upon the amount of recoverable coal then remaining in the leased premises, such amount shall be determined by an arbitrator. (R. 275a, 281a, 285a, 88a) Respondent notified Petitioner "We are desirous of exercising our option to purchase the remaining tonnage of recoverable coal contained in the leased premises" (274a), and was advised by the Petitioner that the option was void (305a). (328)

Respondent requested the Arbitrator to "investigate and determine the remaining tonnage of recoverable coal in the leased premises and the present worth of the royalties payable thereon if there is any disagreement in connection with the latter." (257a)

The Arbitrator "agreed to act as arbitrator under this agreement" and, as asked by the Respondent, "to arbitrate the questions at which your companies are at variance." (318a)

Subsequently he mailed to both parties an award (252a), in which he construed the words "desirous of exercising our option to purchase" (274a) as an "election to purchase." (252a, 253a)

The award showed on its face that the Arbitrator had made no personal investigation of the recoverable coal and that his findings of fact were based upon *ex parte* evidence received from the Respondent and others (252a, 253a).

The award stated, "I have had the accuracy of the maps submitted and of the mining done since the date of that survey checked, have had thicknesses of the coal measured, and the areas of coal remaining and the probable recoverable coal calculated and from these data make the following findings . . ."

The Petition alleged misconduct by the Arbitrator in failing to hold a hearing or give notice of a hearing and in not taking testimony under oath or affirmation (90a). Respondent admitted that the Arbitrator did not take testi-

mony under oath or affirmation (96a). Petitioner differed with the calculation prepared by the Arbitrator (198a).

4. *Grounds for decision below.*

The Judge of the Court of Common Pleas of Greene County, Pennsylvania, stated in his adjudication:

> "As neither side attempted in any particular to follow the Arbitration Act, it is manifest that the award of Howard N. Eavenson was a common law award." (122a)
>
> "Poland has not been deprived of its property without due process of law." (129a)

The Supreme Court stated in its opinion (R. 335)

> "There was no controversy, within the meaning of the word as used in the Arbitration Act, to be settled by an arbitrator. Eavenson was to calculate the remaining mineable coal tonnage by applying the rules of measurement customary in the profession in which the parties agreed he was skilled."

(There was no evidence to support this finding.)

E.

REASONS FOR GRANTING THE WRIT.

1. The State of Pennsylvania, by its Supreme Court, deprived the Petitioner of its property without due process of law, by holding there was no controversy within the meaning of the word as used in the Pennsylvania Arbitration Act.

2. By holding that the determination of the recoverable coal was not one of dispute and difference involving a hearing.

3. Such decision denied a federal right in express terms, in substance and effect, [illegible]as without substantial support, or any support, in the [illegible]nce.

4. Such decision is a federal question of substance, decided in a way not in accord with applicable decisions of this Court.

5. Such decision denies the right to notice of hearings, to produce evidence and cross-examine that produced, in a common law award.

6. The questions are of public importance and substance. They involve the power of a State to determine that the Arbitration Act of the State does not apply to an agreement to arbitrate between its citizens or citizens of another state, by the mere finding, without evidence to support it, that there was no controversy, that the award was at common law and did not involve at hearing and all thereby implied.

Wherefore your petitioner prays that a Writ of Certiorari be granted under the seal of this Court directed to the Supreme Court of Pennsylvania, to the end that this cause be reviewed and determined by this Court as provided by the Statutes of the United States; and for such further relief as to this Court may seem proper.
Dated this 20th day of February, 1948.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1947.

No.

POLAND COAL COMPANY, a corporation, *Petitioner*,

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HILLMAN COAL & COKE COMPANY, a corporation, *Respondent*.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

A.

OPINION BELOW.

The opinion and decree of the Supreme Court of Pennsylvania is reported in 357 Pa. 535; 55 A 2 414.

B.

JURISDICTION.

In addition to the statements and citations contained in the petition (*supra*) it is contended that the Supreme Court of the United States has jurisdiction to review the judgment in this case because:

1. The judgment of the Supreme Court of Pennsylvania entered November 12, 1947, (R. 326) and the refusal of the motion for reargument, entered November 24, 1947 (R. 326) constitute a final judgment.

2. The judgment sought to be reviewed is by the highest court of the Commonwealth of Pennsylvania in which a decision could be had.

Constitution of Pennsylvania, Art. V, Sect. 1-3.

3. The Federal question sought to be reviewed were raised in the petition to vacate the award, in the Court of Common Pleas of Greene County, Pennsylvania, (R. 90a) and were decided against the contention of the petitioner, by that court (R. 129a).

4. The Federal questions sought to be reviewed were raised in the Assignments of Error in the Supreme Court of Pennsylvania (R. 327).

5. The judgment of the Supreme Court of Pennsylvania denied a title, right, privilege or immunity claimed by petitioner under the Pennsylvania Arbitration Act of April 25, 1927, P. L. 381, No. 248 (5 P. S. 170) (R. 13.)

6. The judgment of the Supreme Court of Pennsylvania, does not rest upon a non-federal ground which independently and adequately supports its judgment.

7. The court held there was no controversy, within the meaning of the word as used in the Arbitration Act, to be settled by an arbitrator and affirmed the judgment of the lower court holding the award was a common law award and denied petitioner a hearing and all that is implied thereby.

8. The judgment of the Supreme Court of Pennsylvania denied a Federal right, based upon findings without substantial support in the evidence.

C.

STATUTE INVOLVED.

The Pennsylvania Arbitration Act of April 25, 1927, P. L. 381, No. 248; 5 P. S. 161.

The scope of that Act is evidenced by its title which is as follows[1]:

> "Concerning arbitration, and to make valid and enforceable written provisions and agreements for the arbitration of disputes in certain contracts, including contracts to which the State or any municipal subdivision thereof may be a party; regulating the procedure under such provisions and agreements; and conferring certain powers and imposing certain duties upon the courts with reference thereto."

The Act provides:

Sect. 1.

> "A provision in any written contract, except a contract for personal services, to settle by arbitration a controversy thereafter arising out of such contract, or out of the refusal to perform the whole or any part thereof * * * shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Section 3 provides:

> "The party aggrieved by the alleged failure, neglect or refusal of another to perform under a written agreement for arbitration may petition the Court of Common Pleas of the county having jurisdiction for an order to show cause why such arbitration should not proceed in the manner provided for in such agreement."

---

[1] In Pennsylvania "The title of an act must be considered as part of it; it limits its scope, and may properly be resorted to as an aid to its construction." Pa. R.R. Co. v. Ribbet. 66 Pa. 164, 169. Glen Alden C. Co. v. Scranton, 282 Pa. 45, 51.

Section 6 of the Act (5 P. S. 166) provides:

"All testimony shall be taken under oath or affirmation as is now provided in suits at law. . . ."

Section 10 provides (5 P. S. 170):

"In either of the following cases the court shall make an order vacating the award upon application of any party to the arbitration:

c. Where the arbitrator was guilty of misconduct . . . or any other misbehavior by which the rights of any party have been prejudiced."

D.

A statement of the case has been given under heading "D" in the petition.

E.

SPECIFICATION OF ERRORS TO BE URGED.

The Supreme Court of Pennsylvania erred:—

1. In entering the following judgment:

"The order appealed from is affirmed, costs to be paid by the appellant." (R. 326) which order was as follows:

"And now, April 7th, 1947, this matter came on for hearing, and after due consideration thereof, for the reasons hereinbefore set forth, the rule issued June 15, 1946 to show cause why the award of the arbitrator, Howard N. Eavenson, dated March 26, 1946, should not be vacated, is discharged at the cost of the petitioner. By the Court, Hook, President Judge. Attest: J. Harvey Burge, Prothonotary." (129a) (R. 327)

2. In entering the following judgment
"Reargument refused." (R. 326)

3. In denying petitioner the protection of the Arbitration Act of Pennsylvania by holding there was no controversy within the meaning of the word as used in the Act.

4. By holding that the determination of the recoverable coal was not one of dispute and difference involving a hearing.

5. By holding that the arbitrator was to calculate the remaining mineable coal tonnage by applying the rules of measurement customary to the profession, without substantial support in the evidence, or any evidence to support such finding.

6. By holding a common law award does not involve a hearing and notice thereof and the right to produce evidence and cross-examine that produced.

7. In depriving petitioner of its property without due process of law, in violation of the Fourteenth Article of Amendment to the Constitution of the United States.

F.

SUMMARY OF ARGUMENT.

I. The Arbitration Act of Pennsylvania, as construed by the Supreme Court of the state, deprives petitioner of its property without due process of law.

II. A federal right was specifically set up and claimed in the state court.

(a) Such right was denied, based upon findings, without substantial support in the evidence.

(b) This court will inquire whether such federal right was denied in express terms or in substance and effect.

(c) If this requires an examination of evidence, that examination will be made.

III. The judgment was not in accord with applicable decisions of this court.

(a) There was a failure to agree upon the amount of recoverable coal.

(b) There was a dispute between the parties as to such amount.

(c) The amount of the recoverable coal under ground was not a specific thing which could be measured.

(d) By the terms of the Lease the Lessor did not represent the condition of the mine and the said coal.

(e) The dispute concerned the value of something which was not to be inspected and valued from observation, because it was not known how much recoverable coal existed, upon the date of the lease or subsequent thereto.

IV. A common law award involves a hearing and all thereby implied.

V. The case is of public importance.

G.

ARGUMENT.

I.

The Arbitration Act of Pennsylvania, as Construed by the Supreme Court of the State, Deprives Petitioner of its Property Without Due Process of Law.

The pertinent provisions of the Arbitration Act of Pennsylvania, are set forth in paragraph "C" of the Brief, p. 13 ante.

Paragraph III of the Lease between the parties provides (281a):

> "If the parties shall fail to agree upon the amount of recoverable coal then remaining in the leased premises, such amount shall be determined by the Arbitrator provided for in Section X hereof, and his decision shall be final and binding upon both parties hereto."

Paragraph X provides (285a, 286a):

> "In case of any difference of opinion between the Lessor and the Lessee as to the proper method of con-

ducting mining operations in the coal covered by this lease, or in determining whether or not certain coal is recoverable in accordance with the definition hereinbefore set forth, or in determining the remaining tonnage of recoverable coal in the event of the Lessee exercising its option to purchas the leased premises, or the present worth of royalty payments for the remaining recoverable coal, such differences will, upon the written request of either party hereto, be submitted for decision to an Arbitrator, as hereinafter provided, whose decision shall be final and enforceable by the party in whose favor it is rendered." . . .

Paragraph VII provides (284a):

"RECOVERABLE COAL"

"It is agreed between the Lessor and the Lessee that the Lessee shall mine and remove from the leased premises all such coal as is of merchantable quality and as can be mined and removed in a safe, practical, workmanlike and economical manner under wage scales existing in the district in which the leased premises are located, and in accordance with the mining practices prevailing in said district." . . .

The Court in its opinion said (R. 334):

"In dealing with Section X in its relation to the evidence in the record, it is necessary to ascertain the parties' intention. The section provided for various contingencies. For present purposes it may be considered as reading as follows: 'In case of any difference of opinion between the lessor and the lessee' as to the remaining tonnage of recoverable coal to be paid for at the specified rate, the 'differences will, upon the written request of either party hereto, be submitted for decision' to Eavenson."

"The question is whether, in the words of the Arbitration Act, there was 'a controversy thereafter arising out of the said contract or refusal to perform any part thereof'? 'Thereafter arising,' in the context, means arising after defendant notified plaintiff that it exercised the option to buy the mine. What were the facts at that time? Defendant was mining coal and paying royalty to the plaintiff pursuant to the contract; there

> was no controversy about those two facts. The next fact to be noted is that defendant gave notice that it exercised the option by accepting plaintiff's offer to sell the unmined coal at the specified price. The acceptance of the offer required the plaintiff to convey. All that remained open was to measure the amount of the coal remaining to be mined."

It will be noted that the Respondent gave no notice that it exercised the option, but wrote Petitioner (217a) "We are desirous of exercising our option," and the lower court so found as a fact (29a, 110a). This was merely an expression of contemplated acceptance.

In *Warner Bros. Theatres, Inc.* v. *Proffitt,* 329 Pa. 316, 319, the Court stated:

> "An option is a contract to keep an offer open * * *. It contemplates a subsequent contract of sale, which will, however, only arise if the optionee elects to exercise his option rights by accepting the offer * * *. The acceptance of an offer, to be effective, must be unequivocal * * *. An option presents no exception to this rule * * *. Until the optionee elects to purchase the property by an unequivocal acceptance, there is no contract for the sale of land. The optionee is not bound until he accepts the offer."

The court in *United Mercantile Agencies, Inc.* v. *Slotsky,* 121 Pa. Super. 1, 3, cited with approval a section of the Restatement of the Law of Contracts as follows:

> "An offerer is entitled to know in clear terms whether the offeree accepts his proposal. It is not enough that the words of a reply justify a probable inference of assent."

Certainly it created no obligation upon the Petitioner to convey or the Respondent to buy.

The lease required an exercise of the option before a dispute on the purchase price could be referred to the arbitrator. There was no election to purchase here prior to the award. Respondent therefore did not comply with the terms

of the offer. Arbitration had to follow not precede the election to purchase. There could be no valid award until there had been a binding election to purchase.

It is true, as stated by the Court "the quantity of coal to be paid for was to be determined by Eavenson" (R. 335)—in the event the option was exercised and the parties did not agree as to the amount of recoverable coal—but there was no evidence that he was to "calculate the remaining mineable coal tonnage by applying the rules of measurement customary in the profession in which the parties agreed that he was skilled."

The record does not show what rules of measurement he applied. It is clear that he did not calculate the remaining mineable coal tonnage. *He had the probable coal calculated* (252a).

He delegated his duties to persons unknown.

The Court's interpretation of the Lease, that although the parties failed to agree and there *was* a difference of opinion, —there was no controversy, within the meaning of the word as used in the Arbitration Act, to be settled by an arbitrator,—denies the Petitioner the protection of the provisions of the Arbitration Act and thereby deprives Petitioner of its property without due process of law.

II.

A federal right was specifically set up and claimed in the state court. (See paragraph 3 under Jurisdiction, page 10 ante.)

(a) Such right was denied, based upon findings, without support in the evidence. (See page 10 ante.)

(b) This Court will inquire whether such federal right was denied in express terms or in substance.

(c) If this requires an examination of evidence, that examination will be made.

> "Where the federal question was squarely presented to the lower court and decided by it, the judgment of

the highest state court affirming that of the lower court is a decision of the question, even though the decision of the latter court is based on the theory that the case is controlled by other federal considerations."

Straus v. *American Pub. Association*, 231 U. S. 222; *El Paso and N. E. R. Co.* v. *Gutiurez*, 215 U. S. 87.

A finding of fact by the state court is not conclusive on the Supreme Court where a federal right is shown to have been denied as a result thereof where the findings are shown to be without substantial support in the evidence.

Great Northern Ry. Co. v. *Washington*, 300 U. S. 154, 686.

"When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. If this requires an examination of evidence, that examination must be made."

Norris v. *Alabama*, 294 U. S. 587, 589, 590.

III.

The judgment was not in accord with applicable decisions of this court.

(a) There was a failure to agree upon the amount of recoverable coal.

(b) There was a dispute between the parties as to such amount.

(c) The amount of the recoverable coal under ground was not a specific thing, which could be measured.

(d) By the terms of the Lease the Lessor did not represent the condition of the mine and the said coal.

(e) The dispute concerned the value of something which was not to be inspected and valued from observation, because it was not known how much recoverable coal

existed, upon the date of the lease or subsequent thereto.

The Respondent wrote a letter to the Arbitrator (256a, 257a) in which it stated:

"Poland Coal Company has refused our request to meet with us and has indicated clearly, by letter dated the 8th inst., that it is not disposed to make any agreement upon the amount of recoverable coal remaining in the leased premises. We are advised by counsel that this is the equivalent of a failure to agree upon the amount of recoverable coal in the leased premises, which is specified in Section III of the lease as an event, the occurrence of which justifies the submission of the question to you as Arbitrator.

"Accordingly, this is our written request under Sections III and X of the lease that you, as the Arbitrator, investigate and determine the remaining tonnage of recoverable coal in the leased premises and the present worth of the royalties payable thereon if there is any disagreement in connection with the latter."

Julian Kennedy, Jr., President of Petitioner, testified as follows: (197a, 198a, 199a)

By the Court:

Q. Let me ask you, Mr. Kennedy, is there any dispute by your company with the award of the arbitrator as being incorrect?

A. Your Honor, I don't know what you mean by dispute.

Q. I mean do you differ with the calculation prepared by the arbitrator?

A. Yes, sir, we would differ.

Q. You would now or did you then?

A. We would then. The Poland Coal Company, if your Honor please, is cut up by placings, and unless that property is drilled there is no way of telling the total amount of coal. Now we know a certain area, what the coal is in there, we would not agree with Mr. Eavenson's report on that, but we don't know what is in the other area until it has been drilled.

Mr. Reed:

Q. You mean by that you haven't any evidence to the contrary but you just don't agree with Mr. Eavenson, is that it?

A. No. I don't know just how to put it in words. Mr. Eavenson has made a report. He doesn't know how much coal is in there. I would not know how to tell how much coal was in there.

Q. Mr. Eavenson would know as well as any coal man would know?

A. Yes, but does any coal man know?

Q. Maybe not, but that is the agreement you made in 1941, you know Mr. Eavenson is a very experienced and skilled coal man?

A. Yes, I thought I was pretty good myself.

Q. You say any coal man might be wrong about what coal is under there?

A. That's right.

Q. You have no evidence you are prepared to submit to Mr. Eavenson that shows that he is wrong, have you?

A. I think we could on tonnage, yes.

Q. You think you could?

A. Yes.

Q. You mean you have some that you want to submit?

A. I haven't it here, no, sir.

Q. Why didn't you say in your answer that you didn't, that there wasn't enough allowed to you in tonnage, why didn't you say it was unfair, there is no such averment of that kind in this arbitration proceeding?

In *Omaha* v. *Omaha Water Co.*, 218 U. S. 180, this court said (pp. 193-194):

> "An arbitrator implies a difference, a dispute, and involves ordinarily a hearing and all thereby implied. The right to notice of hearings, to produce evidence and cross-examine that produced, is implied when the matter to be decided is one of dispute and difference. But when as here, the parties had agreed that one should sell and the other buy a specific thing, and the price should be a valuation fixed by persons agreed upon, it cannot be said that there was any dispute or difference. Such an arrangement precludes or prevents difference,

and is not intended to settle any which has arisen. This seems to be the distinction between an arbitration and an appraisement, though the first is often used when the other is more appropriate."

Citing *Continental Ins. Co.* v. *Garrett*, 60 C. C. A. 395, 125 Fed. 589, in which it was said "That was a case where the full amount of the insurance was claimed as the extent of the loss. That was denied. It was therefore a plain case of the submission of a dispute or difference which had to be adjusted. The rule applicable to a judicial proceeding therefore applied. It was in fact an arbitration, though the arbitrators were called appraisers.

The dispute concerned the thing which had been destroyed, the value of something which was not to be inspected and valued from observation, because it was not in existence. Evidence was therefore essential to show what had been destroyed as well as its value."

In the present case it is clear that the price for which the Petitioner was to sell and the Respondent to buy, was a valuation which could not be determined until the amount of recoverable coal was determined, as to which the parties could not agree and the amount found by the Arbitrator was disputed.

Recoverable coal, as defined in the Lease (284a), was "coal as is of merchantable quality and as can be mined and removed in a safe, practical, workmanlike and economical manner under wage scales existing in the district in which the leased premises are located, and in accordance with the mining practices prevailing in said district." In view of this definition, it was not unreasonable to dispute the "findings" of an arbitrator "who had the accuracy of the maps submitted (by Respondent) and of the mining done since the date of that survey checked, have had thicknesses of the coal measured, and the areas of coal remaining and the *probable recoverable coal calculated.*" (253a)

This was not the purchase of a specific thing, at a price, but of the probable recoverable coal on findings, based upon

hearsay and probability, made by undisclosed persons, without a hearing and all thereby implied.

It was "recoverable coal" as defined in the lease (above p. 21) that the arbitrator was to determine.

As to whether the Petitioner had knowledge of the remaining acreage leased, referred to in a footnote to the Court's opinion (R. 335), is not material.

The lease provided (277a, 278a)

> "Nothing herein contained shall be deemed to constitute a representation by the Lessor as to the fitness of the demised property, of the condition of the mine and the said coal or of the condition of the coke plant, machinery and equipment covered by this lease. It is agreed that this lease merely covers the said property in the condition in which it exists at 12:01 A. M. on November 16, 1941. The Lessee does hereby take the risk of the condition and fitness of the demised premises."

The award was a mere guess—mysterious—vaguely "probable".

It is significant that no where in this record does the Respondent make a statement or estimate, as to the probable recoverable coal in the property upon the date of the lease, or at the time it wrote "we are desirous of exercising our option." (274a)

IV.

A common law award involves a hearing and all thereby implied.

The lower court stated in its opinion:

> "As neither side attempted in any particular to follow the Arbitration Act, it is manifest that the award of Howard N. Eavenson was a common law award." (122a)

The decision of this court in *Omaha* v. *Omaha Water Co.*, 218 U. S. 180 (*supra*) would seem to make it unnecessary to

argue that a common law award involves a hearing and all thereby implied.

A long line of decisions in Pennsylvania so hold.

> *Curran* v. *Phila.*, 264 Pa. 111;
> *Scholler Bros.* v. *Otto A. C. Hagen Corp.*, 158 Pa. Superior Ct. 170, 173.

As said by Mr. Justice Cardoza in *Berizzi* v. *Krausz*, 239 N. Y. 315, 318-320, "The appellee, knowing nothing of the evidence, had no opportunity to rebut or even explain it."

V.

The case is of public importance.

The Pennsylvania Arbitration Act of 1927 was held constitutional in *Katakura & Co. Ltd.* v. *Vogue S. H. Co.*, 307 Pa. 544, where the court held the act applies to arbitration between citizens of Pennsylvania and other states.

In *Kaisha, Ltd.* v. *Ewing-Thomas Corp.*, 313 Pa. 442, the Court held the Arbitration Act is applicable, whether the arbitration is to be held in Pennsylvania or elsewhere.

> "If one of the parties to a contract which provides for the arbitration of disputes arising under it, will not voluntarily proceed with the arbitration, he may be compelled to do so in the manner provided for in Sect. 3 of the Act."

Respectfully submitted,

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